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IN THE

# Supreme Court of the United States

MCCREARY COUNTY, KENTUCKY, ET AL.,
*Petitioners*,

v.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, ET AL.,
*Respondents*.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

## BRIEF FOR THE STATES OF ALABAMA, FLORIDA, IDAHO, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, OHIO, PENNSYLVANIA, SOUTH CAROLINA, TEXAS, UTAH, VIRGINIA, AND WYOMING, AS *AMICI CURIAE*, IN SUPPORT OF PETITIONERS

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## QUESTIONS PRESENTED

1. Whether the Establishment Clause is violated by a privately donated display on government property that includes eleven equal size frames containing an explanation of the display along with nine historical documents and symbols that played a role in the development of American law and government where only one of the framed documents is the Ten Commandments and the remaining documents and symbols are secular.

2. Whether a prior display by the government in a courthouse containing the Ten Commandments that was enjoined by a court permanently taints and thereby precludes any future display by the same government when the subsequent display articulates a secular purpose and where the Ten Commandments is a minority among numerous other secular historical documents and symbols.

3. Whether the *Lemon* test should be overruled since the test is unworkable and has fostered excessive confusion in Establishment Clause jurisprudence.

4. Whether a new test for Establishment Clause purposes should be set forth by this Court when the government displays or recognizes historical expressions of religion.

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## BRIEF FOR *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Sup. Ct. R. 37.4, the *amici* States respectfully submit this brief in support of Petitioners and urge reversal of the Sixth Circuit's judgment.

## INTEREST OF *AMICI CURIAE*

Like Petitioners in this case, the State of Alabama has "Foundations of Our Law" displays in its Capitol and its Judicial Building. Alongside the Ten Commandments, Alabama's displays include: (i) the Code of Justinian; (ii) the Magna Carta; (iii) the Mayflower Compact; (iv) the Declaration of Independence; (v) the United States Constitution; (vi) the Bill of Rights; (vii) the Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments to the Constitution; and (viii) brief commentary. *See, e.g.*, Ala. Jud. Sys., *Alabama Judicial Building Tour, Foundations of Our Law–Rotunda Display*, at http://www.judicial.state.al.us/tour_display.cfm (last visited Dec. 1, 2004) (including photographs and HTML version of Judicial Building display).

The other *amici* States (or local governments within them) likewise display the Ten Commandments in a variety of ways—as do various entities within the Federal Government, including this Court. Given the long history and prevalence of Ten Commandments displays on public property, the *amici* States have a keen interest in seeing such displays upheld as constitutional.

## SUMMARY OF ARGUMENT

Depictions of the Ten Commandments are a common feature of public life in the United States. Such displays—whether exhibited as symbols, monuments, plaques, or documents—date back at least to the 1870s, and there are today (literally) thousands of them across the country. The displays are particularly common at seats of government, and are perhaps most often found in and around courthouses. Indeed, this Court's own building contains more than a dozen depictions of the Commandments. The history and ubiquity of displays on public property involving religious themes in general, and the Ten Commandments in particular, merely confirm this Court's observation that "[t]here is an unbroken history"—here, going back some 130 years—"of official acknowledgment by all three branches of government of the role of religion in American life . . . ." *Lynch* v. *Donnelly*, 465 U.S. 668, 674 (1984).

Although the displays challenged in this case satisfy both the "*Lemon* test," *see Lemon* v. *Kurtzman*, 403 U.S. 602, 612–13 (1971), and the "endorsement test," *see County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chap.*, 492 U.S. 573, 592–94 (1989), the *amici* States respectfully submit that this case should be analyzed under the "coercion test" articulated by Justice Kennedy in *Allegheny*, *id.* at 659 (Kennedy, J., concurring in judgment in part and dissenting in part). Under the coercion test, "government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.' " *Lee* v. *Weisman*, 505 U.S. 577, 587 (1992) (quoting *Lynch*, 465 U.S. at 678); *see also Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 302 (2000).



The *Lemon* test has spawned confusion in the lower courts—and worse, has engendered hostility toward religion. The coercion test better represents the Framers' understanding of religious establishments and our Nation's historic practices by properly focusing on government compulsion in religious matters.

When judged (i) against the history and ubiquity of public displays featuring religious symbols generally and displays of the Ten Commandments in particular, and (ii) in the light of the utter absence of governmental coercion, it is apparent that Petitioners' historic-documents displays do not violate the Establishment Clause. Rather, the displays represent a constitutional acknowledgment of religion's indisputably important role in American life and history. Indeed, at the end of the day, the result here is the same whether the case is analyzed under the coercion test, the endorsement test, or even under *Lemon* itself.

## ARGUMENT

### I. THE TEN COMMANDMENTS HAVE LONG BEEN DISPLAYED ON PUBLIC PROPERTY THROUGHOUT THE NATION.

As Justice Holmes famously observed, frequently "a page of history is worth a volume of logic." *N.Y. Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921). So it is that many of this Court's Establishment Clause cases have involved a detailed examination of history. *See, e.g.*, *Engel* v. *Vitale*, 370 U.S. 421, 425–36 (1962); *McGowan* v. *Maryland*, 366 U.S. 420, 431–43 (1961); *Everson* v. *Bd. of Educ. of Ewing*, 330 U.S. 1, 8–16 (1947). Likewise, here, the long history of depictions of religious symbols, including the Ten Commandments, on public property bears directly on the questions presented in this case. *See, e.g.*, *Elk Grove Unified Sch. Dist.* v. *Newdow*, 124 S. Ct. 2301, 2323–24 (2004) (O'Connor, J., concurring in the judgment) (emphasizing "history and ubiquity" of challenged practice); *Marsh* v. *Chambers*, 463 U.S. 783, 786–92 (1983) (emphasizing historical pedigree of legislative prayer).[1]

The Ten Commandments have aptly been called "the most influential law code in history." John T. Noonan, Jr., *The Believer and the Powers that Are* 4 (1987). It is not surprising, then, that depictions of the Ten Commandments are a common feature of public (not to mention private) life in the United States. Public displays of the Ten Commandments—whether exhibited as symbols, monuments, plaques, or documents—date back at least to the 1870s. *See, e.g.*, *King* v. *Richmond County*, 331 F.3d

[1] Inasmuch as Indiana's brief for the *amici* States in *Van Orden* v. *Perry*, No. 03-1500, addresses public displays and monuments featuring religious symbolism generally, this brief will focus on public monuments and displays featuring the Ten Commandments in particular.



1271, 1273–74 (11th Cir. 2003) (superior court seal depicting Ten Commandments and sword used at least since 1872); *Modrovich* v. *Allegheny County*, 385 F.3d 397, 399 (3d Cir. 2004) (bronze plaque containing Ten Commandments donated to county in 1918); *Freethought Soc'y of Greater Philadelphia* v. *Chester County*, 334 F.3d 247, 249 (3d Cir. 2003) (bronze plaque donated to county in 1920). Such displays, and particularly monuments, are, to put the matter plainly, all over the place—thanks in part to the fact that "as many as 4,000 Ten Commandments monoliths were erected in public spaces across the country" during the 1950s and 1960s by the Fraternal Order of Eagles. Jess Bravin, *When Moses' Laws Run Afoul of the U.S.'s, Get Me Cecil B. deMille*, Wall St. J., Apr. 18, 2001, at A1 (describing campaign to donate Ten Commandments monuments in connection with deMille's 1956 movie, *The Ten Commandments*).

Ten Commandments displays are particularly common at seats of government and courthouses around the country. For example, Ten Commandments monuments (donated by the Fraternal Order of Eagles) stand in the state capitol complexes in Colorado and Texas. *See Van Orden* v. *Perry*, 351 F.3d 173, 175–76 (5th Cir. 2003), *cert. granted*, 125 S. Ct. 346 (2004) (No. 03-1500); *State* v. *Freedom from Religion Found., Inc.*, 898 P.2d 1013, 1015–16 (Colo. 1995), *cert. denied*, 516 U.S 1111 (1996). Likewise, a mural in the chamber of the Supreme Court of Pennsylvania depicts Moses carving a tablet, with the Ten Commandments listed below. *See* Pa. Unified Jud. Sys., *Supreme Court Photo Gallery*, http://www.courts.state.pa.us/index/Supreme/photogallery9.asp (last visited Dec. 7, 2004). Similarly, the old federal "district courthouse in Cleveland . . . is adorned with a large, magnificent mural of the Ten Commandments flanked by angels." *American Civil Liberties Union of Ohio Found., Inc.* v. *Ashbrook*, 375 F.3d 484, 506 (6th Cir. 2004) (Batchelder,

J., dissenting). And the ceremonial courtroom in the Birch Bayh Federal Courthouse in Indianapolis also contains a mural depicting (among other things) Moses holding the Ten Commandments. *See* Sarah Evans Barker, *The Rule of Law*, 15 Traces 3 (Summer 2003) (including photograph showing the Ten Commandments); *see also Suhre* v. *Haywood County*, 55 F. Supp. 2d 384, 385–86 (W.D.N.C. 1999) (describing marble plaques of the Ten Commandments on either side of sculpture of Lady Justice in county courthouse in western North Carolina).

So, too, in Washington, D.C., depictions of the Ten Commandments seem to be around every corner. A statue of Moses holding the Ten Commandments adorns the rotunda of the Library of Congress. There is a statue representing "Liberty of Worship" resting on the Ten Commandments outside the Ronald Reagan Building and International Trade Center. Outside the E. Barrett Prettyman Federal Courthouse there is a depiction of the Decalogue on tablets with Hebrew writing. And, of course, the Supreme Court building itself contains several Commandments displays. *See* Carrie Devorah, *God in the Temples of Government*, Human Events, Nov. 24, 2003, at 20; Carrie Devorah, *God in the Temples of Government: Part II*, Human Events, Dec. 22, 2003, at 14.

In this Court's building, depictions of the Ten Commandments abound. Moses is portrayed in the frieze on the south wall of the Courtroom "holding two overlapping tablets, written in Hebrew" on which "Commandments six through ten are partially visible." Office of the Curator, Supreme Court of the U.S., *Courtroom Friezes: North and South Walls Information Sheet* 1, http://www.supremecourtus.gov/about/north&southwalls.pdf (updated Aug. 18, 2000). Moses is again represented holding two tablets in the East Pediment. *See* Office of the Curator, Supreme Court of the U.S., *The East Pediment Information Sheet* 1, http://www.supremecourtus.gov/about/eastpediment.pdf



(updated Aug. 18, 2000). The tablets are depicted beside a profile of Moses in eight metopes in the Great Hall. *See* Office of the Curator, Supreme Court of the U.S., *Exterior Portrait Medallions and the Great Hall Metopes Information Sheet* 2, http://www.supremecourtus.gov/about/medallions&metopes.pdf (updated Sept. 17, 2003). And finally, images of the Ten Commandments as two rectangular tablets with curved tops and Roman numerals I–X "appear on the support frame of the Courtroom's bronze gates . . . ; on the lower, interior panels of the Courtroom doors; and held by the figure representing 'Law' in the Library woodwork." Office of the Curator, Supreme Court of the U.S., *Symbols of Law Information Sheet* 2, http://www.supremecourtus.gov/about/symbolsoflaw.pdf (updated May 23, 2002).

It goes without saying, of course, that these displays are not efforts to proselytize or indoctrinate. Rather, according to this Court's Curator, they serve an important secular purpose:

> Throughout the history of western art, tablets have been used to signify "the Law." This tradition is closely associated with Moses, the Hebrew lawgiver, who according to the Book of Exodus descended from Mount Sinai with two stone tablets inscribed with the Ten Commandments. Over time, the use of two tablets has become a symbol for the Commandments, and more generally, ancient laws. Tablets signify the permanence of the law when "written in stone."

*Id.*

The longstanding tradition and current ubiquity of displays on public property involving religious themes in general, and the Ten Commandments in particular, further confirm this Court's observation that "[t]here is an unbroken history"—here, dating back some 130 years—"of

official acknowledgment by all three branches of government of the role of religion in American life . . . ." *Lynch* v. *Donnelly*, 465 U.S. 668, 674 (1984). "This history may help explain why the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause" and "ha[s] refused 'to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective *as illuminated by history*.' " *Id.* at 678 (quoting *Walz* v. *Tax Comm'n*, 397 U.S. 664, 671 (1970)) (emphasis in *Lynch*). In short, "the meaning of the [Establishment] Clause is to be determined by reference to historical practices and understandings." *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chap.*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part).

As Justice Kennedy observed in *Allegheny*, a workable and defensible Establishment Clause test "must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion." *Id.* "A test . . . that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the [Establishment] Clause." *Id.* Whatever standard the Court chooses to apply in this case, the longstanding tradition of public displays of the Ten Commandments should be upheld as a permissible "acknowledgment . . . of the role of religion in American life." *Lynch*, 465 U.S. at 674.

## II. THE COURT SHOULD ABANDON THE "*LEMON* TEST," AND, AT LEAST FOR DISPLAY CASES, APPLY THE "COERCION TEST."

Both the district court and the court of appeals analyzed this case under the three-part test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). Under the "*Lemon* test," a statute or government activity must: (i) "have a secular . . . purpose"; (ii) have a "principal or primary effect . . .



that neither advances nor inhibits religion"; and (iii) "not foster 'an excessive government entanglement with religion.' " *Id.* at 612–13 (citation omitted) (quoting *Walz*, 397 U.S. at 674). The court of appeals treated the "endorsement test," *see Allegheny*, 492 U.S. at 592–94, as a refinement of the second, "effects prong" of *Lemon*. *Am. Civil Liberties Union of Ky.* v. *McCreary County*, 354 F.3d 438, 446 (6th Cir. 2003).

Although the displays challenged in this case satisfy both the *Lemon* test and the endorsement test, *see infra* at 20–24, the *amici* States respectfully submit that this case should be analyzed under the "coercion test" articulated by Justice Kennedy in *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in judgment in part and dissenting in part). *See also Lee* v. *Weisman*, 505 U.S. 577, 587 (1992); *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 302 (2000). As its name implies, the coercion test focuses on government coercion or compulsion in matters of religion, which one leading scholar (and now judge) has called "the lost element of establishment" as the Founders understood that legal concept. Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933 (1986).

### A. The *Lemon* Test Has Engendered Confusion in the Lower Courts and Hostility Toward Religion.

In deciding Establishment Clause cases, it has become an "almost obligatory observation that the *Lemon* test is often maligned." *Glassroth* v. *Moore*, 335 F.3d 1282, 1295 (11th Cir.), *cert. denied*, 124 S. Ct. 497 (2003). A majority of the Members of this Court have led or joined in criticism or disapproval of the *Lemon* test at one time or another. *See Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398–400 (1993) (Scalia, J., joined by Thomas, J., concurring in judgment); *Allegheny*,

492 U.S. at 655–57 (Kennedy, J., joined by Rehnquist, C.J., White and Scalia, JJ., concurring in judgment in part and dissenting in part); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 346–49 (1987) (O'Connor, J., concurring in judgment); *Wallace* v. *Jaffree*, 472 U.S. 38, 107–13 (1985) (Rehnquist, J., dissenting). The test itself has been likened to a "ghoul," *Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring in judgment), whose "career in the decisional law of this Court" has been "checkered," *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 319 (Rehnquist, C.J., dissenting), and whose application is a "sisyphean task." *Committee for Public Educ. & Religious Liberty* v. *Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting).

Unfortunately, the *Lemon* test "has simply not provided adequate standards for deciding Establishment Clause cases." *Jaffree*, 472 U.S. at 110 (Rehnquist, J., dissenting). As Judge McConnell has observed—

> Each part of the *Lemon* test is deeply ambiguous, and each—if taken literally—would produce highly unattractive results. Consequently, the lower federal courts and state courts have given the test widely different and seemingly contradictory interpretations, and they often ignore it altogether to avoid undesirable results.

Michael W. McConnell, *Stuck with a Lemon: A New Test for Establishment Clause Cases Would Help Ease Current Confusion*, 83 A.B.A. J. 46, 46 (1997). "The result of [the *Lemon* test's] three ambiguous principles is a jurisprudence of confusion and inconsistency—with a heavy dose of hostility to religion thrown in." *Id.* at 47.

Particularly problematic is the *Lemon* test's "secular purpose" prong—which lies at the heart of this case. Indiana's brief for the *amici* States in *Van Orden* v. *Perry*, No. 03-1500, addresses the difficulties with the purpose prong at some length; thus, *amici* do so only briefly here.



As then-Justice Rehnquist observed in *Wallace* v. *Jaffree*, the purpose prong "has proven mercurial in application because it has never been fully defined, and [the Court] never fully stated how the test is to operate." 472 U.S. at 108 (Rehnquist, J., dissenting). Legal scholars have agreed that "[i]t is not entirely clear what 'secular legislative purpose' means." Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2206 n.613 (2003). Equally troublesome, the purpose prong is unfaithful to our history, because the proponents of disestablishment frequently gave "religious or theological justifications for their position,"[2] leading Judge McConnell to ask whether disestablishment itself "[s]hould ... be faulted for reliance on a 'nonsecular purpose[.]' " *Id.* at 2206.

Given the difficulties inherent in the *Lemon* test, this Court has understandably declined to follow it consistently. In *Hunt* v. *McNair*, 413 U.S. 734, 741 (1973), the Court called the *Lemon* criteria "no more than helpful signposts." In *Larson* v. *Valente*, 456 U.S. 228 (1982), and

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[2] Judge McConnell cites Thomas Jefferson's Bill for Establishing Religious Freedom. McConnell, *Establishment and Disestablishment*, 44 Wm. & Mary L. Rev. at 2206 & n.615. Among the first justifications for religious freedom offered in that Bill was "that Almighty God hath created the mind free." Thomas Jefferson, A Bill for Establishing Religious Freedom para. 1 (1779) *in* 5 *The Founders' Constitution* 77, 77 (Philip B. Kurland & Ralph Lerner eds. 1987). Another was "[t]hat all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do ...." *Id.*

*Marsh* v. *Chambers*, 463 U.S. 783 (1983), the Court ignored *Lemon* altogether. *See Lynch*, 465 U.S. at 679 ("In two cases, the Court did not even apply the *Lemon* 'test.' ") (citing *Marsh* and *Larson*). In *Lynch*, the Court even went "so far as to state that [the *Lemon* test] has never been binding on us." *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 319 (Rehnquist, C.J., dissenting) (citing and quoting *Lynch*, 465 U.S. at 679). And in *Lee* v. *Weisman*, the Court likewise "mentioned, but did not feel compelled to apply, the *Lemon* test." *Id.* at 320. However much maligned, though, the *Lemon* test seemingly lives on, being irregularly invoked by the Court—most recently in *Santa Fe Independent School District* v. *Doe*, 530 U.S. at 314. *See also Lamb's Chapel*, 508 U.S. at 395 n.7 ("*Lemon*, however frightening it might be to some, has not been overruled").

Given the confusion and ambiguity that the *Lemon* test has engendered—not to mention the ceaseless litigation hostile to religion that the test's vagaries have fueled—the *amici* States respectfully suggest that the time has come simply to abandon it.[3]

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[3] At a minimum, the Court should take this opportunity to clarify *Lemon*'s purpose prong. In *Board of Education of Westside Community Schools* v. *Mergens*, 496 U.S. 226 (1990), a plurality of the Court suggested that there is a distinction between purpose and motive under the purpose prong of *Lemon*: "Even if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate the Act, because what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law." *Id.* at 249 (plurality opinion). The Court has never explicitly endorsed that distinction, however, or explained how to apply it.

Given the facts of this case, it is also worth noting that "*a* secular purpose . . . is all that *Lemon* requires," not an "exclusively secular" purpose. *Lynch*, 465 U.S. at 681 n.6 (emphasis added); *Jaffree*, 472 U.S. at 56 ("a statute that is motivated in part by a religious purpose may satisfy the first [*Lemon*] criterion"). It likewise bears emphasis that "a court has no license to psychoanalyze the legislators" or decisionmakers. *Id.* at 74 (O'Connor, J., concurring in judgment).



### B. The "Coercion Test" Better Represents the Framers' Intent and Our Nation's Historic Practices.

In *Allegheny*, a case (not unlike this one) involving holiday displays featuring religious objects, Justice Kennedy proposed what has come to be called the "coercion test." After recognizing that "the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society," 492 U.S. at 657 (citing *Lynch* 465 U.S. at 678), Justice Kennedy addressed the limits that the Clause places on such recognition and accommodation of religion:

> The ability of the organized community to recognize and accommodate religion in a society with a pervasive public sector requires diligent observance of the border between accommodation and establishment. Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith, or tends to do so." These two principles, while distinct, are not unrelated, for it would be difficult indeed to establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply the substantial benefits that would sustain a state-established faith, direct compulsion to ob-

> servance, or governmental exhortation to religiosity that amounts in fact to proselytizing.

*Id.* at 659–60 (citation omitted) (quoting *Lynch*, 465 U.S. at 678).

Three years later, the Court adopted Justice Kennedy's formulation of the coercion test in *Lee* v. *Weisman*:

> The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so."

505 U.S. at 587 (quoting *Lynch*, 465 U.S. at 678). The Court has since applied the coercion test in *Santa Fe Independent School District* v. *Doe*, 530 U.S. at 302 (quoting *Lee*, 505 U.S. at 587).

The coercion test best captures the Framers' understanding of (i) what constituted an "establishment of religion" as that term is used in the First Amendment and (ii) a principal evil to be avoided by prohibiting such an establishment. The writings of James Madison, George Mason, and Thomas Jefferson suggest that all of them viewed the elimination of government coercion or compulsion as being at the heart of religious freedom.

As this Court has noted, during debate on the religion clauses in Congress in 1789, James Madison, the measures' sponsor,

> said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and *enforce* the legal observation of it *by law*, nor



> *compel* men to worship God in any manner contrary to their conscience. * * * He believed that the people feared one sect might obtain a preeminence, or two combine together, and establish a religion to which they would *compel* others to conform.

*McGowan*, 366 U.S. at 441 (internal quotation marks omitted) (quoting 1 Annals of Cong. 730–31 (1789)) (emphasis added). Madison's earlier Memorial and Remonstrance Against Religious Assessments likewise targeted government compulsion in religious matters, asserting as "a fundamental and undeniable truth, 'that Religion . . . can be directed only by reason and conviction, *not by force or violence*.'" James Madison, Memorial and Remonstrance Against Religious Assessments 1 (1785) (quoting Va. Decl. of Rights § 16 (1776)), *in* 5 *The Founders' Constitution* 82 (Philip B. Kurland & Ralph Lerner eds. 1987) (emphasis added).

Madison's Memorial and Remonstrance relied, in turn, on the Virginia Declaration of Rights for the proposition that religious belief should not be coerced. In his first draft of the religion clause of the Declaration of Rights, George Mason—later a leading proponent of a bill of rights for the Federal Constitution—likewise denounced government compulsion in religious matters:

> That as Religion, or the Duty which we owe to our divine and omnipotent Creator, and the Manner of discharging it, can be governed only by Reason and Conviction, *not by Force or Violence*; and therefore that all Men shou'd enjoy the fullest Toleration in the Exercise of Religion, according to the Dictates of Conscience, *unpunished and unrestrained by the Magistrate*, unless, under Colour of Religion, any Man disturb the Peace, the Happiness, or Safety of Society, or of Individuals. And

> that it is the mutual Duty of all, to practice Christian Forbearance, Love and Charity towards Each other.

George Mason, First Draft of the Virginia Declaration of Rights (1776), *in* 1 *The Papers of George Mason* 276, 278 (Robert A. Rutland ed., 1970) (emphasis added).[4] As finally adopted, the religion clause of the Declaration of Rights retained Mason's original denunciation of "force or violence" in religious matters. *See* Va. Decl. of Rights § 16 (1776), *in* 5 *The Founders' Constitution* 70. Madison used this condemnation of government compulsion in religious matters (which might otherwise be mistaken as relating only to free exercise) to attack religious tax assessments, a hallmark of establishment.

Thomas Jefferson likewise condemned government compulsion in religious matters. According to Jefferson, "[co]mpulsion in religion is distinguished peculiarly from compulsion in every other thing." That he said, is because "I may grow rich by art I am compelled to follow, I may recover health by medicines I am compelled to take agt. my own judgmt., but I cannot be saved by a *worship* I disbelieve & abhor." Thomas Jefferson, Notes on Locke (1776), *in* 1 *The Papers of Thomas Jefferson* 544, 547 (Julian P. Boyd ed., 1950) (based on John Locke, *A Letter Concerning Toleration* (1689)). Jefferson's famous Bill for Establishing Religious Freedom focused on eliminating government coercion in religious matters so "that no man shall be *compelled* to frequent or support any relig[i]ous Worship place or Ministry whatsoever, nor shall be *enforced*, *restrained*, *molested*, or *burthened* in his body or goods, nor shall otherwise *suffer* on account of his religious opinions or belief . . . ." Thomas Jefferson, A Bill for Establishing Religious Freedom para. 2 (1779), *in* 5 *The Founders' Constitution* 77 (emphasis added). Jefferson's thinking was based in part on observations that "the holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by *coercions* on either, as was in his Almighty power to do" and "[t]hat to *compel* a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical." *Id.* para. 1 (emphasis added). These references to compulsion and coercion were retained when the Bill was adopted in 1786. *See* Act for Establishing Religious Freedom (1786), *in* 5 *The Founders' Constitution* 84, 84; *cf.* Letter from Thomas Jefferson to James Madison (June 9, 1798) *in* 30 *Papers of Thomas Jefferson* 393, 393 (Barbara B. Oberg ed., 2003) ("[T]hey have brought into the lower house a sedition bill, which among other enormities, undertakes to make printing certain matters criminal, tho' *one of the amendments to the Constitution has so expressly taken religion, printing presses &c. out of their coercion.*") (emphasis added).

[4] Later paragraphs in the first draft are in Thomas Ludwell Lee's handwriting, but the excerpt reprinted above was written by Mason. 1 *The Papers of George Mason* at 279.



Two caveats are in order. First, these statements by Madison, Mason, and Jefferson indicate that the principal evil targeted by the Establishment and Free Exercise Clauses was government coercion through actual (*i.e.*, physical or legal) compulsion in religious matters. That is, the kind of coercion the Framers contemplated apparently involved actions that would truly "compel" religious belief, practice, or financial support with "force," "violence," or "law." *See also Lee*, 505 U.S. at 640 (Scalia, J., dissenting) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty.*"); *cf.* Letter from Thomas Jefferson to Rev. Samuel Miller (Jan. 23, 1808) *in* 5 *The Founders' Constitution* 98, 98–99 (including as potential penalty for

failing to observe a day of fasting and prayer "some degree of proscription perhaps in public opinion"). Having said that, the question of precisely what kind of government conduct or influence constitutes impermissible coercion—*e.g.*, whether actual or psychological—need not divide the Court here as it did in *Lee*. Whether the concept of unconstitutional coercion properly includes psychological or peer pressure, *see Lee*, 505 U.S. at 593–94, or not, *see id.* at 640–44 (Scalia, J., dissenting), that kind of pressure is plainly absent in this case. As detailed below, *see infra* at 19–20, the inanimate displays in this case are entirely passive, involve no religious ceremony, and entail no "captive audience."

Second, the *amici* States do not contend that the coercion test is a "one-size-fits-all" solution to Establishment Clause problems. The Court has already eschewed "any single test or criterion in this sensitive area." *Lynch*, 465 U.S. at 679. As Justice O'Connor has observed, "the Establishment Clause . . . cannot easily be reduced to a single test," because "[t]here are different categories of Establishment Clause cases, which may call for different approaches." *Bd. of Educ. of Kiryas Joel Village Sch. Dist.* v. *Grumet*, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring in part and concurring in judgment). *Amici*'s point is simply that, in the context of public displays involving religious symbols, the coercion test best distinguishes permissible acknowledgment and accommodation from impermissible establishment. Accordingly, the coercion test should provide the frame of reference for this case.

## III. THE DISPLAYS IN THIS CASE DO NOT VIOLATE THE ESTABLISHMENT CLAUSE.

When judged (i) against the history and ubiquity of public displays featuring religious symbols generally and displays of the Ten Commandments in particular, and (ii)



in the light of the utter absence of governmental coercion, it is evident that the historic-documents displays in this case do not violate the Establishment Clause. Indeed, a reversal should follow not only under the coercion test, but under the endorsement and *Lemon* tests, as well.

### A. Petitioners' Displays Satisfy the Coercion Test.

As noted above, public displays of the Ten Commandments—whether as symbols, plaques, or monuments—date back well over a century. There are now (literally) thousands of such displays across the country. The long history and prevalence of these displays at courthouses and seats of government suggest that the Decalogue is displayed not to impose or advance some religious establishment, but instead merely to acknowledge the significant role that religion has indisputably played in shaping this Nation's law and government. In addition, as this Court's Curator's explanation suggests, *see supra* at 7, the Ten Commandments are an immediately recognizable ancient legal text, and are thus an appropriate symbol for ancient law generally. The displays in this case, moreover, are presented as only one part of a collection of historically significant documents and images, further underscoring the Commandments' historic—as opposed to religious—significance.

There is also no hint of government coercion—however defined—in Petitioners' displays. First, the displays are entirely passive; they hang on a wall to be viewed or ignored at a passerby's option. Second, no one is invited, much less coerced, to participate in any kind of religious ceremony; there are no organized prayers, hymns, or the like associated with the displays. Finally, there is no "captive audience" problem, as may sometimes be the case in other settings; again, courthouse visitors are free to ignore the displays entirely. The absence of government

coercion, combined with the history and ubiquity of similar Ten Commandments displays, renders the displays in this case permissible under the Establishment Clause.

### B. Petitioners' Displays Satisfy the Endorsement Test.

As noted above, the result should be the same even under the endorsement or *Lemon* tests. As for endorsement, Justice O'Connor has observed more than once that the "history and ubiquity" of a challenged practice is an important consideration under the endorsement test "because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion." *Allegheny*, 492 U.S. at 630 (O'Connor, J., concurring in part and concurring in judgment); *see also Newdow*, 124 S. Ct. at 2323–24 (O'Connor, J., concurring in judgment). A reasonable observer would be particularly unlikely to perceive endorsement in this case—where the Decalogue is displayed as only one of nine documents and symbols, all depicted for their historical significance to the Nation's system of law and government. Indeed, removing the Ten Commandments from such a historical display would communicate a message of hostility—not neutrality—toward religion, which a reasonable observer (who, presumably, would be familiar with the Commandments' removal) surely would not miss.

### C. Petitioners' Displays Satisfy the *Lemon* Test.

The court of appeals based its decision striking down the displays in this case not on the presence of coercion or endorsement[5] but, instead, on the presence of what it

[5] Only Judge Clay joined the main opinion's endorsement test analysis.



perceived to be an impermissible religious purpose under the *Lemon* test. The court's faulty purpose-prong analysis underscores just how badly the secular-purpose inquiry has gone off track.

The court of appeals' reasoning was based largely on a misapplication of *Stone* v. *Graham*, 449 U.S. 39 (1980) (*per curiam*), outside the context of public school classrooms. The court's rote application of *Stone* failed to account for the fundamental differences between the schoolhouse and courthouse settings.

In public elementary and secondary schools, this Court has said, "[t]he State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Edwards* v. *Aguillard*, 482 U.S. 578, 584 (1987). As a result, this "Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Id.* at 583–84. These atmospheric and "coercive power" concerns were heightened in *Stone*, where the posting of the Ten Commandments in a classroom setting functioned "purely as a religious admonition." *Lynch*, 465 U.S. at 679. No such "admonition" is present in this case, however, where both the setting and the manner of display are entirely different.

As the Chief Justice has observed (and, again, as this Court's Curator's explanation confirms, *see supra* at 7), in addition to their obvious religious importance, the Ten Commandments "[u]ndeniably . . . have secular significance as well, because they have made a substantial contribution to our secular legal codes." *City of Elkhart* v. *Books*, 532 U.S. 1058, 1061 (2001) (Rehnquist, C.J., dissenting from denial of certiorari). Placement of the Ten Commandments in a courthouse or seat of govern-

ment, whether alone or with other historic documents, "emphasizes the foundational role of the Ten Commandments in secular, legal matters." *Id.* Given the secular significance of the Decalogue and the manner in which posting it in a courthouse emphasizes its secular, legal impact, it is clear that Petitioners had a legitimate secular purpose for displaying the Ten Commandments in their courthouses. Certainly, Petitioners' actions were not "motivated wholly by religious considerations," *Lynch*, 465 U.S. at 680, as would be required to find a violation under the purpose prong of *Lemon*. *See also supra* note 3. Under *Lynch* and *Allegheny*, Petitioners' purpose is best understood as a permissible effort to "acknowledg[e] . . . the role of religion in American life." *Lynch*, 465 U.S. at 674.

Further misapplying *Stone*, the court of appeals required that, in order to demonstrate a legitimate secular purpose, "the government must present the Ten Commandments objectively and must integrate them with a secular message," 354 F.3d at 449, by demonstrating an "analytical or historical connection," *id.* at 451, between the Decalogue and other documents in a public display. In *Stone*, however, this Court merely observed that "[t]his is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." 449 U.S. at 42. As Chief Judge Boggs pointed out, *Stone*'s *dictum* was not "an attempt to state binding limits on all future constitutionally valid displays." *Am. Civil Liberties Union of Ky.* v. *McCreary County*, 361 F.3d 928, 933 (6th Cir. 2004) (Boggs, C.J., dissenting from denial of rehearing en banc). But even if it were, there was nothing in *Stone* to "suggest that a display that includes the Ten Commandments as part of an array containing eight or nine otherwise secular, historical documents, violates



the First Amendment unless the display also provides an explicit analytical or historical connection between the clearly secular and the arguably religious items." *Id.*

As Judge Ryan further demonstrated, *Lynch* did not require an "analytical or historical connection" between the crèche and the "reindeer pulling Santa's sleigh," 465 U.S. at 671, and *Allegheny* did not require an "analytical or historical connection" between the menorah and the Christmas tree. 354 F.3d at 475 (Ryan, J., dissenting). More significantly, he observed, the court of appeals' misapplication of *Stone* would effectively doom most displays with religious symbols because "[g]overnment monuments and displays appear in a context in which the displays must speak for themselves, for they do not present an opportunity to attach lengthy disclaimers and statements of purpose." *Id.* Accordingly, the test developed by the court of appeals is not only unworkable, but also wholly inconsistent with *Lynch* and *Allegheny*.

Finally, the courts below erred in imputing to Petitioners' current displays an allegedly impermissible purpose underlying earlier displays. "The district court found it 'significant' that [Petitioners'] original displays, containing only the Ten Commandments 'were erected in violation of the Supreme Court's clear ruling in *Stone*.' " 354 F.3d at 457 (quoting *Am. Civil Liberties Union of Ky.* v. *McCreary County*, 145 F. Supp. 2d 845, 849–50 (E.D. Ky. 2001) (footnote omitted)). " 'This defiance,' according to the district court, 'imprinted the defendants' purpose, from the beginning with an unconstitutional taint . . . . ' " *Id.* (quoting 145 F. Supp. 2d at 850 (footnote omitted)). The court of appeals faulted the district court's analysis, which "appeared to afford exclusive weight to [Petitioners'] past conduct without addressing the specific content of the revised displays," but agreed that "the history of [Petitioners'] involvement with the displays strongly indicated that the primary purpose was religious." 354

F.3d at 458; *see also* 361 F.3d at 931 (Clay, J., concurring in denial of rehearing en banc).

As an initial matter, given the differences between the courthouse and schoolhouse settings, even the premise of the district court's "unconstitutional taint" analysis is faulty: It is by no means clear that the original courthouse displays violated *Stone*. But even if Petitioners' original displays were unconstitutional, that should not "taint" forever Petitioners' good-faith efforts to come into compliance. If government is to function, its officials must be allowed to correct their mistakes. They should not labor under an unconstitutional taint of past misconduct while attempting to set matters straight. This is especially true in the field of Establishment Clause jurisprudence, where the line between the permissible and the impermissible is frequently "a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship," *Lemon*, 403 U.S. at 614, that can only be "dimly perceive[d]," *id.* at 612. In reality, what Petitioners' efforts "strongly indicate[d]" was a bona fide intention to comply with the Constitution.

By misinterpreting *Stone* to fashion its own unprecedented test for Ten Commandments displays, the court of appeals erred in its purpose-prong analysis under *Lemon*. Under this Court's decision in *Lynch*, Petitioners had a legitimate secular purpose—anchoring modern law in ancient sources—for their courthouse displays. This secular purpose, combined with the lack of endorsement of religion and the utter absence of coercion, demonstrates that the displays in this case represented an entirely acceptable and proper "acknowledgment . . . of the role of religion in American life." 465 U.S. at 674.



## CONCLUSION

The judgment of the United States Court of Appeals for the Sixth Circuit should be reversed.

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